

1           A       Yes, it describes it. I don't  
2       know if that's the only document headed that  
3       way, but it does describe this document.

4           Q       And do you remember when I asked  
5       you, "Are these the rankings that underlie  
6       your analysis of top rated events for 2009,"  
7       I'm reading from page 194 still. And on page  
8       195 you answered, "They appear to be. They  
9       certainly look like what I looked at. Again,  
10      I couldn't be absolutely positive without  
11      going back and opening my raw data workbooks,  
12      but it appears to be." Do you recall that I  
13      asked you that question, and you gave me that  
14      answer?

15               MR. SCHMIDT: Your Honor, I'm  
16      going to say again, this is certainly not  
17      impeachment. I don't think it's proper  
18      refreshing.

19               MR. TOSCANO: Your Honor, this is  
20      directly responsive to your question about --  
21      or your suggestion that we spend time with  
22      him trying to find out what he relied on. And

1 Mr. Schmidt added that we actually took his  
2 deposition. I'm trying to refresh Mr. Brooks'  
3 recollection that when we deposed him on this,  
4 he couldn't tell us what he relied on.

5 JUDGE SIPPEL: Hold on, this is  
6 not a deposition. This is his testimony. My  
7 comment was with respect to what you were  
8 trying to accomplish in his direct testimony.  
9 It was appearing to me more of what you would  
10 want to be getting from a witness in a first-  
11 time deposition. That's all I was saying. I  
12 was just -- I mean, I'm being very patient  
13 with this, but I'm not sure how much further  
14 you want to take it.

15 MR. TOSCANO: And I had moved on.  
16 I just wanted to point out in response to your  
17 suggestion that I had tried to do this in the  
18 deposition, but --

19 JUDGE SIPPEL: Well, you can't do  
20 it again here.

21 MR. TOSCANO: And Mr. Brooks  
22 didn't -- wouldn't recognize any of his backup

1 materials.

2 JUDGE SIPPEL: All right. You  
3 know, whatever you got here, this is an  
4 exhibit, the deposition is an exhibit in the  
5 record, isn't it?

6 MR. TOSCANO: It is, Your Honor.

7 JUDGE SIPPEL: You can make the  
8 point in proposed findings, or -- but I just  
9 say I don't -- you just seem to be coming back  
10 to the same point over and over again here.

11 MR. TOSCANO: Thank you, Your  
12 Honor. I'll move on.

13 JUDGE SIPPEL: Okay.

14 JUDGE SIPPEL: I mean, I'm going  
15 to a baseball game tonight. You can take his  
16 deposition all night if you want to.

17 (Laughter.)

18 BY MR. TOSCANO:

19 Q Mr. Brooks, Neilsen reports  
20 ratings, as you said, for 56 separate local  
21 metered markets. Correct?

22 A They report metered ratings, yes.

1           Q       And depending on the time periods  
2       the ratings the Tennis Channel calculated are  
3       the aggregated totals for either 27, or 35, or  
4       48 of those 56 markets. Correct?

5           A       I think 48 was the maximum, yes.

6           Q       And the number of markets you  
7       included depended on whether or not Tennis  
8       Channel received a rating in that market.  
9       Right?

10          A       Yes, very importantly.

11          Q       Now, I'd like to direct your  
12       attention to your direct testimony, page 6,  
13       Paragraph 12. That's a carryover paragraph  
14       from the prior page.

15          A       I'm sorry, page 6?

16          Q       Yes, it is the carryover paragraph  
17       12 from page 5.

18          A       Okay, thank you.

19                   JUDGE SIPPEL: So, you have to  
20       start reading from page 12 and then go over.

21                   THE WITNESS: You mean paragraph  
22       12.

1 JUDGE SIPPEL: I mean, paragraph  
2 12.

3 THE WITNESS: That's a mistake I  
4 made.

5 MR. TOSCANO: Are you ready?

6 THE WITNESS: Yes.

7 BY MR. TOSCANO:

8 Q If you look, again, on top of page  
9 6 you write, "When a network falls below  
10 percent coverage in a market, it becomes  
11 difficult to draw sufficient viewers to meet  
12 this viewing minimum." Do you see that?

13 A Yes.

14 Q You're talking about the minimums  
15 for a network to be rated in a particular  
16 local Nielsen market. Correct?

17 A Yes.

18 Q I'd like to show you an exhibit.

19 MR. TOSCANO: Your Honor, may I?

20 JUDGE SIPPEL: Certainly.

21 MR. TOSCANO: Comcast Exhibit 921.

22 JUDGE SIPPEL: Thank you.

1 (WHEREUPON, THE AFOREMENTIONED  
2 DOCUMENT WAS MARKED COMCAST  
3 EXHIBIT 921 FOR IDENTIFICATION.)

4 BY MR. TOSCANO:

5 Q And, Mr. Brooks, this is one of  
6 the documents that you relied on in coming up  
7 with your opinions in this case. Correct?

8 A It certainly looks familiar.  
9 Again, I can't say positively, but I believe  
10 it was, yes.

11 Q Is this one of the documents that  
12 you reviewed in preparation for your testimony  
13 today?

14 A I remember looking at this in my  
15 prep, yes.

16 Q Okay.

17 A Or something very much like this.

18 Q Okay. Now, again, your testimony  
19 was that when a network falls below  
20 coverage in a market, it becomes difficult to  
21 draw sufficient viewers to meet this viewing  
22 minimum. Correct?

1           A       Yes.

2           Q       But you would acknowledge that,  
3       for example, that if you look at Comcast  
4       Exhibit 921, line 53, that in Dayton, Tennis  
5       Channel has an                   penetration, but got  
6       a Nielsen local rating in that market.  
7       Correct?

8           A       Yes. Oh, yes.

9           Q       And if you go to line 45, you'll  
10      see that in Austin, Tennis Channel got a  
11      Nielsen rating, local market rating, yet it  
12      only had                   penetration. Correct?

13          A       Right. That's why I said it  
14      became difficult, not impossible.

15          Q       So, it became -- so, it's not  
16      impossible under                   .

17          A       I said it became difficult. If  
18      you average those in which it is, in fact,  
19      rated, you'll see average is                   , very  
20      close to the                   that I said here.

21          Q       But there are wide variations  
22      around that                   . Correct?

1           A       Actually, in order to characterize  
2       them as wide, I would need to know what the  
3       distribution was around that     . You picked  
4       out the extreme examples, but that doesn't  
5       mean that most of them don't cluster in the  
6       high           and the low     s, which I think is  
7       the case.

8           Q       But, in fact, the -- it's not the  
9       level of distribution that keeps Tennis  
10      Channel from being rated in the local market.  
11      Correct?

12          A       There are two things, distribution  
13      and popularity within that distribution.  
14      Those are the two factors. The rule that  
15      Nielsen has, literally, is that over the  
16      course of a week the cable network, in order  
17      to be rated has to reach           of the  
18      viewers in that market by whatever means. If  
19      it only has           distribution, it has to  
20      get an enormous rating within that  
21      to get to almost           of the whole  
22      market. If it's got           distribution



1 and nobody is watching it, it may not be rated  
2 because it may not reach of the  
3 whole market. So, it is possible to make up  
4 for one of those things with the other thing.

5 In reality, in practice, you need  
6 to have about , which is I think  
7 what I said, on average in order to be able to  
8 reach that of viewership among the  
9 -- or of viewership among the  
10 whole market.

11 Q Mr. Brooks, another reason the  
12 network doesn't get rated in a Nielsen local  
13 market is that the network just isn't that  
14 popular. Correct?

15 A As I said, it can be low rated and  
16 have wide distribution, or it can be high  
17 rated and have low distribution. Those are  
18 both possible situations.

19 Q And turning back to Comcast  
20 Exhibit 921, you would agree that in Boston  
21 where Tennis Channel gets  
22 penetration, it is not rated by Nielsen.

1 Correct?

2 A I'm sorry, which -- oh, down at  
3 the bottom here?

4 Q Yes. Well, line 59.

5 A Yes. It's an excellent example of  
6 why I didn't want to use individual markets,  
7 why I wanted to use the aggregate of markets,  
8 because among other things, Nielsen ratings  
9 can vary considerably just because of the  
10 methodology, not because of the real  
11 popularity of the channel between market to  
12 market. These are small samples.

13 MR. TOSCANO: Your Honor, I'd like  
14 to use one final exhibit with Mr. Brooks, if  
15 I may.

16 JUDGE SIPPEL: Yes, sir.

17 MR. TOSCANO: This has been marked  
18 Comcast Exhibit 640. This is in evidence.

19 JUDGE SIPPEL: Thank you. Oh,  
20 we're back to the English language.

21 (Laughter.)

22 BY MR. TOSCANO:

1           Q       Mr. Brooks, I'll represent to you  
2       that this was a document that was produced to  
3       us from the files of Tennis Channel. Could  
4       you tell us, it's an email message from Steven  
5       Badeau to a whole number of people. Could you  
6       tell us who Steven Badeau is?

7           A       Yes, he is the Research Director  
8       for the Tennis Channel.

9           Q       And, in fact, he's one of the  
10      Tennis Channel employees who you relied on to  
11      calculate Tennis Channel, Versus, and Golf  
12      Channel ratings for you. Correct?

13          A       Definitely. He was my -- well,  
14      yes.

15          Q       And I'd like to direct your  
16      attention to the third paragraph in the bottom  
17      email message. Do you see that?

18          A       "A couple of well-penetrated" --

19          Q       Yes. Could you just read the  
20      first two sentences into the record for us?

21          A       "A couple of well-penetrated and  
22      potentially strong Tennis markets fell to the

1 bottom of the list." I'm not sure what the  
2 list is. "Jacksonville has shown -- has the  
3 highest Tennis Channel penetration of  
4 any market, but did not produce enough average  
5 viewing to be measurable, shown as a  
6 rating."

7 Q And if you look at the second page  
8 of that exhibit, do you see a list of ratings  
9 for the Tennis Channel by local market for the  
10 -- from November 5th to December 2010, about a  
11 month?

12 A Yes. It's typically how months  
13 are defined on a local basis. Yes.

14 Q Now, is this a document that  
15 Tennis Channel provided to you in connection  
16 with your opinions in this case?

17 A Individual market readings for  
18 December? If it is, it's got to be an extract  
19 of something much larger, because I wasn't  
20 generally looking at individual months, I was  
21 looking at a nine-month period. And this isn't  
22 even within those nine months.

1           Q       Do you agree that Jacksonville,  
2       Florida -- do you agree with Mr. Badeau that  
3       Jacksonville, Florida has the           highest  
4       Tennis Channel penetration in any local  
5       market?

6           A       Jacksonville -- well, I have to  
7       study this. Is there a rack in here  
8       somewhere? No. So, what am I looking at on  
9       this table that I haven't seen before?

10          Q       I'm just asking you, I'm asking  
11       you your understanding of Tennis Channel's  
12       penetration in Jacksonville.

13          A       Oh, I see --

14          Q       Let me help you. If you look back  
15       at Comcast Exhibit 921, which is dated  
16       slightly before this message, there is, in  
17       fact, a penetration figure for Jacksonville on  
18       row 44. Do you see that?

19          A       Yes. And it's               ?

20          Q       Do you see that? This is from  
21       your backup materials. Correct?

22          A       Yes. This is one I said that I

1        had seen. And this is                      Tennis  
2        Channel penetration in Jacksonville in  
3        September. September? Yes, SEPTEMBER.

4                Q        So, despite the fact that Tennis  
5        Channel had                      penetration in  
6        Jacksonville, Florida in September 2010,  
7        between November 5th, 2010 and December 3rd,  
8        2010 it got a                rating. Do you see that?

9                A        Yes, that's the kind of  
10       fluctuation you get locally. Sure.

11              Q        And could you tell us what a  
12       rating means?

13              A        It means they -- well, it means  
14       they didn't detect enough viewing to reach  
15       their minimum in their sample, but that's very  
16       important, because a sample in a market like  
17       Jacksonville is probably        to       households  
18       total, not the                you have locally, not  
19       the                you had in my 48 markets. So,  
20       that's precisely the reason why I didn't want  
21       to look at individual local markets for a low  
22       penetrated network. The numbers can fly all

1 over the place from month-to-month. The  
2 sample is just too small to measure a low  
3 penetrated network.

4 Q Mr. Brooks, you understand there's  
5 a difference between getting a low rating and  
6 not being rated in a local market by Nielsen.  
7 Correct?

8 A It may be meaningless if the  
9 sample is not adequate to measure at that  
10 level.

11 Q But if you look back at Comcast  
12 Exhibit 921, you will see that Tennis Channel  
13 was, in fact, rated in Jacksonville, Florida.  
14 Correct?

15 A Because at the time of their  
16 qualification, it reached , or  
17 of viewers cumulatively over a week.  
18 It could, in theory, still get a rating,  
19 even if it did that.

20 Q And that's, in fact, exactly what  
21 happened in November-December of 2010, as  
22 shown in Comcast Exhibit 640. Correct?

1           A       Well, no, because you're comparing  
2       September to November, so I don't know if it  
3       still qualified, or if it would still qualify  
4       in November if they carry their qualification  
5       for a number of months, for example. I'm not  
6       sure of that detail of how Nielsen -- how long  
7       Nielsen maintains qualification in a market,  
8       if they have to qualify every month, or not.

9           Q       But, in fact, in Jacksonville for  
10      November and December, 2010, Tennis Channel  
11      garnered a       rating. Correct?

12          A       Off the very small sample of  
13      metered homes, yes.

14          Q       Okay. So, there's no necessary  
15      relationship between penetration and ratings.  
16      Correct?

17          A       Oh, no, I wouldn't say that at  
18      all. The more penetration you have for a whole  
19      lot of reasons that I laid out elsewhere, and  
20      I think talked about elsewhere, higher  
21      penetration on average will give you more  
22      chance to be exposed, more chance to get



1 viewers, and all that sort of stuff. So, you  
2 will tend to do better than you do at very low  
3 levels of penetration.

4 Q But there is no necessary  
5 relationship. Right?

6 A It's not a one-on-one  
7 relationship, it's not a well known  
8 relationship. And this -- I would never use  
9 this. This is very unstable data from a  
10 single market in a single month. It's almost  
11 a definition of what -- Neilsen would say you  
12 might not want to use that.

13 Q But, in fact, Mr. Badeau, who you  
14 relied upon for your analysis used that data.  
15 Correct?

16 A He rolled it up with much other  
17 data. He did not use it individually, nor  
18 would I allow him to.

19 JUDGE SIPPEL: I think it's -- the  
20 title of this document may be of interest to  
21 us, and that is it's subject is "A Quick Look  
22 at Tennis Channel by media market." I don't

1 know if that's a term of art, or -- what does  
2 that tell you, Mr. Brooks? You receive a  
3 document like that that's -- with that title,  
4 what does it tell you?

5 THE WITNESS: It suggests to me --

6 JUDGE SIPPEL: Okay, suggests to  
7 you.

8 THE WITNESS: It suggests to me  
9 that he is doing just what he says there, the  
10 latest data that comes in shows these things.  
11 It doesn't suggest to me that he's endorsing  
12 it as the actual fact in that market over a  
13 longer period of time. It's a quick look,  
14 it's not a detailed analysis.

15 BY MR. TOSCANO:

16 Q One final question. Similarly  
17 situated is not a term of art in the field of  
18 media research. Correct?

19 A No.

20 MR. TOSCANO: I have no further  
21 questions at this time, Your Honor. Thank  
22 you.

1 THE WITNESS: Sure.

2 JUDGE SIPPEL: Redirect? Mr.

3 Oshinsky. Yes, sir.

4 MR. OSHINSKY: I have a question  
5 about --

6 JUDGE SIPPEL: This is the  
7 Enforcement Bureau --

8 MR. OSHINSKY: It's the  
9 Enforcement --

10 BY MR. OSHINSKY:

11 Q On page 21 of your direct  
12 testimony at paragraph 40 --

13 A Yes.

14 Q -- it states that there was a  
15 decline in the local ratings for Golf Channel  
16 and Versus, and that that was reflected in the  
17 national ratings. And that Tennis Channel,  
18 which is measured only in local markets did  
19 not decline in those markets. Can you explain  
20 -- can you expand on that a little bit?

21 A Yes, I would be happy to. Very  
22 important that this table be read vertically,

1 not across. And what I was doing here was  
2 showing what I had noticed, is that on a local  
3 market coverage area rating, covered elsewhere  
4 in this report, both Golf and Versus had  
5 declined in ratings from 2009 to 2010, whereas  
6 Tennis Channel had not declined; and,  
7 therefore, they were closer together in 2010.  
8 In fact, Tennis and Golf identical.

9 I wanted to see whether the  
10 national data that I did have for Golf and  
11 Versus tracked that, showed the same kind of  
12 change. Obviously, I could not make the  
13 comparison for Tennis, because it doesn't have  
14 national ratings. But I could see if there  
15 was a similar decline on a national basis for  
16 Golf or Versus, or whether that was an  
17 artifact of the limited number of markets I'm  
18 dealing with here.

19 And what the table indicates is  
20 that, indeed, the decline in the local  
21 markets, the 48 markets, was matched by a  
22 decline in the national markets, or the

1       national market I should say. That was the  
2       purpose of this chart.

3               Q       And does that have a bearing on  
4       the discussion you had with Mr. Toscano about  
5       the fact that certain events may have rated  
6       nationally, and not locally in your chart, in  
7       your findings?

8               A       Well, this is a -- it may not,  
9       actually, because this is based on a very  
10      broad span of months averaging 12 months in  
11      one case, and nine months in the other. The  
12      individual events that Mr. Toscano was  
13      alluding to were on a single day for a single  
14      number of hours in that day, six hours, three  
15      hours, whatever it was. So, it was a very,  
16      very narrow amount of time, so I'd be  
17      reluctant to attribute what's going on -- I  
18      think this is much more representative of the  
19      networks overall, but attribute that to what  
20      might happen in terms of that narrow amount of  
21      time locally and nationally. If that's  
22      responsive.

1           Q       So, I'm still wondering why you  
2 would have an event that might be rated high  
3 nationally, but not rate well locally. Can  
4 you expand on that?

5           A       Oh, sure. The national events  
6 that you saw, you remember they were all on  
7 the Golf Channel, they weren't on Tennis, for  
8 obvious reasons, nor Versus for that matter.  
9 That means that the national audience was  
10               of the whole country, basically, was  
11 your basis for that. It's a very large base  
12 for that nationally.

13               In the local markets, the 48  
14 markets, you are talking about only within  
15 those particular markets, which may or may not  
16 represent the total markets of the Golf  
17 Channel, in particular.

18               And, as I also pointed out  
19 earlier, local market ratings are much more  
20 subject to fluctuation because of the small  
21 samples in local markets. So, it makes it  
22 very difficult to compare a particular event,

1 a narrow window of time nationally to that  
2 narrow window of time in these markets, called  
3 drilling down in the data. That's why I  
4 wanted to expand this analysis, not to deal  
5 with individual markets, not to deal with  
6 individual months, but to get as much into  
7 that bucket as I could, as broad as I could,  
8 nine months, full day in order to washout the  
9 inevitable bounces you're going to have on  
10 individual days, individual markets, certainly  
11 individual events within that. They can  
12 bounce all over the place.

13 When you take the whole thing  
14 together like a ship, like something very big,  
15 it's much less likely to fluctuate or differ  
16 that way nationally, locally.

17 MR. OSHINSKY: That's all, Your  
18 Honor.

19 JUDGE SIPPEL: Well, then what was  
20 your bottom line conclusion after doing what  
21 you have just outlined, directly outlined big  
22 picture versus little picture, what did you

1 conclude from all of that?

2 THE WITNESS: The big picture when  
3 I kept -- used the biggest sample I could,  
4 lined them up apples-to-apples was that these  
5 three networks that I was looking at were  
6 extremely similar in terms of the audience  
7 that they attracted. They were all in the same  
8 -- I can't say ratings in areas, but they were  
9 all in the same tenth of a rating. They  
10 differed only in the hundredths of a rating  
11 point, which in television is not -- so, my  
12 conclusion from this is when you took  
13 everything together, made it broad, they had -  
14 - even-to-even, they had the same audience,  
15 same size of audience.

16 JUDGE SIPPEL: The same size of  
17 audience, not about the demographics, the same  
18 size of audience.

19 THE WITNESS: Likewise, when I  
20 looked at the demographics, my feeling was  
21 that looking at demographics probably, I  
22 think, by ranges of demos, which is the



1 underpinnings of sales, that they were all in  
2 that same 25 to 54, or 35 to 64 age bracket  
3 individually in the 40s, or low 50s. So, they  
4 were similar in demographics, as well. They  
5 could have been different, but they weren't.  
6 They were all in that same middle area.

7 JUDGE SIPPEL: Is that  
8 demonstrated in your testimony here?

9 THE WITNESS: I believe so, sir.

10 JUDGE SIPPEL: Should be.

11 THE WITNESS: Sure.

12 JUDGE SIPPEL: Well, I'm sorry,  
13 you need to go find it. Can you tell me what  
14 was -- when you were retained, you were  
15 retained by the law firm, or by the company?

16 THE WITNESS: By Tennis Channel.

17 JUDGE SIPPEL: That's the company.

18 THE WITNESS: The company, through  
19 the law firm.

20 JUDGE SIPPEL: No, I understand  
21 that. I understand that. But my -- so, I'm  
22 just trying to lay a foundation. But my

1 question is what assignment were you given, or  
2 what mission were you given?

3 THE WITNESS: Specifically, they  
4 asked me if I could do a ratings -- do an  
5 audience comparison of these three channels,  
6 or any others that I felt were appropriate to  
7 this, and since my specialty is audience  
8 analysis, I found that was something that I  
9 felt I could do. So, my charge was to compare  
10 the audiences of Tennis Channel with those of  
11 their primary competitors, Versus and Golf.  
12 That was the assignment.

13 JUDGE SIPPEL: Yes, but for what  
14 reason?

15 THE WITNESS: Well, they told me  
16 that they needed to find out if, in fact, the  
17 three networks were, in their phrase,  
18 similarly situated. And I said, "What does  
19 that mean," because that's not a phrase that  
20 I use, typically, in my work. And they  
21 explained to me that they were -- I don't want  
22 to replicate the legal language, I'm not a